Chang Shu Hua (P) v Goon Fook Hong

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1263 OF 2004
GOPAL SRI RAM, ZULKEFLI AND ZAINUN ALI JJCA
14 FEBRUARY 2008

Evidence — Affidavit — Affidavit evidence — Conflicting evidence — Allegations in affidavits credibly denied by respective parties — Whether disputed facts should be ignored — Whether court empowered to allow parties examine affidavits of deponents — Rules of the High Court 1980 O 38 r 2(3)

The plaintiff, a Taiwanese and a permanent resident of Malaysia, was married to the defendant on 22 February 1983 and had three children aged between 13 and 18 years old. The plaintiff alleged that in December 2002, upon finding out about her husband's adulterous relationship, she had gone to her parent's home in Taiwan. However, when she returned, she found out that the matrimonial home was locked, her personal belongings had disappeared and the children were hid from her. Thereafter, the plaintiff filed a claim against the defendant to restore the matrimonial home with full furnishing, maintenance and custody of the children. However, the defendant contended that the plaintiff's claim was false and was intended to gain sympathy from the court. The High Court judge allowed the plaintiff's claim in part. On appeal, the plaintiff submitted that the learned judge of the High Court had relied heavily on the statements of the children referred to by the defendant in his affidavits.

Held, setting aside the order of the High Court:

(1) The learned judge had erred when, in arriving at his decision, he had attempted to resolve the conflicts in the affidavit evidence of both parties by unduly favouring the defendant's case. Arising from his attempt to resolve the conflicts in the said affidavit evidence the learned judge had also made a number of contradictory findings in his judgment (see para 6).

(2) In view of the many disputed facts raised in the affidavits filed by the plaintiff and the defendant, where such allegations made were credibly denied by the respective parties, the learned judge of the High Court should have ignored the disputed facts and decide the case by consideration of the undisputed fact (see para 11).

(3) It was noted that in the proceedings neither the plaintiff nor the defendant called for oral evidence or applied to cross-examine the deponents of the respective affidavits so as to prove a disputed fact as provided for in O 38 r 2(3) of the Rules of the High Court 1980 (see para 11).

(4) In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender and the court cannot give direction about evidence unless one of the litigants desires such direction to be made. However in the context of the present case, the learned judge of the High Court should have at least indicated to the particular party concerned that unless he or she called oral evidence or applied to cross-examine the deponents of the opposing affidavits to prove either a disputed fact or for the purposes of disproving an allegation made, then he or she may not succeed in proving his or her case (see para 12).

(5) In the circumstances, the order of the High Court was set aside and the case was ordered to be remitted to the High Court for trial by *viva voce* on the issue of maintenance of the plaintiff (see para 13).

[Bahasa Malaysia summary

Plaintif, warganegara Taiwan dan pemastautin tetap Malaysia, berkahwin dengan defendan pada 22 Februari 1983 dan dikurniakan tiga orang anak berumur antara 13 dan 18 tahun. Plaintif mendakwa bahawa pada Disember 2002, selepas mendapat tahu mengenai hubungan sulit suaminya, dia telah pergi ke rumah ibu bapanya di Taiwan. Walau bagaimanapun, selepas kepulangannya, dia mendapati bahawa rumah perkahwinannya berkunci, barang-barang peribadinya hilang dan anak-anak disembunyikan darinya. Kemudian, plaintif memfailkan tuntutan terhadap defendan untuk mengembalikan rumah perkahwinan dengan kesemua perabotnya, nafkah dan hak jagaan anak-anak. Tetapi defendan menghujah bahawa tuntutan plaintif adalah salah dan bertujuan untuk mendapatkan simpati mahkamah. Hakim Mahkamah Tinggi membenarkan sebahagian tuntutan plaintif. Atas rayuan, plaintif menghujah bahawa hakim Mahkamah Tinggi yang bijaksana bersandar kuat kepada pernyataan anak-anak yang dirujuk oleh defendan di dalam afidavit-afidavitnya.

Diputuskan, mengenepikan perintah Mahkamah Tinggi:

(1) Hakim yang bijaksana telah terkhilaf apabila, dalam membuat keputusan, beliau telah cuba untuk menyelesaikan konflik dalam keterangan afidavit kedua-dua pihak dengan terlalu menyokong kes defendan. Hasil daripada percubaannya untuk menyelesaikan konflik dalam keterangan afidavit tersebut hakim yang bijaksana juga telah

membuat beberapa penemuan yang bertentangan dalam penghakimannya (lihat perenggan 6).

(2) Memandangkan banyak fakta yang dipertikaikan telah ditimbulkan dalam afidavit-afidavit yang difailkan oleh plaintif dan defendan di mana pertuduhan yang dibuat telah dinafikan secara jelas oleh pihak-pihak berkenaan, hakim yang bijaksana sepatutnya tidak mengendahkan fakta-fakta yang dipertikaikan tersebut dan memutuskan kes dengan mempertimbangkan fakta-fakta yang tidak dipertikaikan (lihat perenggan 11).

(3) Adalah diperhatikan dalam prosiding-prosiding plaintif mahupun defendan tidak mengemukakan bukti lisan atau memohon untuk memeriksa balas deponen afidavit-afidavit berkenaan bagi membuktikan fakta yang dipertikaikan seperti yang diperuntukkan dalam A 38 k 2(3) Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 11).

(4) Dalam prosiding sivil hakim perbicaraan tidak berkuasa untuk mengarahkan seorang litigan bukti apa sepatutnya dikemukakan dan mahkamah tidak boleh memberi arahan berkenaan bukti kecuali salah seorang litigan menginginkan arahan sedemikian diberikan. Walau bagaimanapun, dalam konteks kes ini, hakim Mahkamah Tinggi yang bijaksana sekurang-kurangnya patut menunjukkan kepada pihak yang berkenaan bahawa, kecuali jika beliau mengemukakan bukti lisan atau memohon untuk memeriksa balas deponen afidavit yang bercanggah tersebut bagi membuktikan sama ada suatu fakta yang dipertikaikan atau bagi tujuan menyangkal suatu pengataan yang dibuat, maka beliau mungkin tidak berjaya dalam membuktikan kesnya (lihat perenggan 12).

(5) Dalam keadaan ini, perintah Mahkamah Tinggi diketepikan dan kes tersebut diarahkan supaya diremit ke Mahkamah Tinggi untuk perbicaraan secara *viva voce* berkenaan isu nafkah plaintif (lihat perenggan 13).]

Notes

For cases on affidavit evidence, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 241–247.

Cases referred to

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (refd)

Legislation referred to

Rules of the High Court 1980 O 38 r 2(3)

Appeal from: Originating Summons No S8-24–1382 of 2004 (High Court, Kuala Lumpur)

Lum Chee Seng (Lum Chee Seng & Associates) for the appellant.
Fong Teng Fook (Yusuf Khan & Fong) for the respondent.

Zulkefli JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the plaintiff against the decision of the High Court at Kuala Lumpur which allowed only a part of the plaintiff's claim for maintenance, matrimonial assets and custody. The learned judge of the High Court only allowed joint custody of the children to both the plaintiff ('the wife') and the defendant ('the husband') with actual care and control to the defendant, and that the matrimonial home would be held by both the plaintiff and the defendant on trust for their children. The plaintiff's other claims including maintenance were dismissed. At the outset of the hearing before us learned counsel for the plaintiff indicated that due to change of circumstances in the last few years pending hearing of the appeal, the plaintiff wished to abandon the other claims in the appeal and is now proceeding only with her claim for maintenance.

BACKGROUND FACTS OF THE CASE

[2] The relevant background facts of the case are as follows.

[3] The plaintiff and the defendant were married on 22 February 1983 and they have three children, two daughters and a son, aged between thirteen and eighteen years old. The plaintiff was from Taiwan and is now a permanent resident of Malaysia. The plaintiff alleged that during the marriage, she and her husband, the defendant had entered into a direct sale business with a company known as E Excel International Incorporated. As a result of their effort, the direct sale business was very successful. Thereafter, the said business was transferred to Wiranet Sdn Bhd in which the defendant holds 1999 shares and the plaintiff holds one share. The family depends on the commission received from the said Wiranet company for daily living, investment and others. The plaintiff alleged that in December 2002, she found out that the defendant had committed adultery. The defendant exerted pressure on her that either she accept his adulterous relationship or be separated from him and be expelled from the matrimonial home. The plaintiff then rushed back to her parents' home in Taiwan. However, when she came back to Malaysia she found out that the matrimonial home was locked, her personal belongings and multi purpose vehicle, Nissan Serena had disappeared. The defendant also hid the children from her. Thereafter,

the plaintiff filed a claim against the defendant to restore the matrimonial home with full furnishing, maintenance and custody of her children (refer to the statement of claim at pp 45–55 of the appeal record). The defendant however, alleged that before the plaintiff deserted the family, she had taken away RM5m from the company's account and left him heavily in debt. Furthermore, the plaintiff has maintained several accounts with nine financial institutions locally as well as in institutions in China and Taiwan. The defendant also alleged that the children were scared of her and she had taught them since they were young to steal from hotels and supermarkets. Therefore, the plaintiff's claim as contended by the defendant is false and is intended to gain sympathy from the court.

FINDINGS OF THE HIGH COURT

[4] The learned judge of the High Court in his judgment allowing only a part of the plaintiff's claim, inter alia, held that the plaintiff is a person of wealthy means who possessed over 52 bank accounts in over nine financial institutions locally, and unaccounted accounts overseas in China and Taiwan. The learned judge found that the plaintiff failed as a mother to provide love and affection to her children. All the three children recalled that the plaintiff taught them to steal from hotel and supermarket. The learned judge further held that the plaintiff had lied to the court that she was ignorant of any third party involvement. The marriage had broken down more than ten years ago. According to the children's account of the past the plaintiff was the cause of the breakdown of the marriage.

DECISION OF THE COURT ON APPEAL

[5] In the appeal before us learned counsel for the plaintiff submitted that the learned judge of the High Court had erred when he relied heavily on the statements of the children referred to by the defendant in his affidavits which were not only unsworn but also were hearsay evidence. Learned counsel for the plaintiff further argued that the learned judge had erred in law and in fact when he held that the contemporary documentary evidence exhibited in the defendant's affidavit were not controverted and showed that the plaintiff is a wealthy person.

[6] Having studied carefully the records of appeal and the proceedings before the learned judge of the High Court, we are of the considered view that the learned judge had erred when in arriving at his decision, he had attempted to resolve the conflicts in the affidavit evidence of both parties by unduly favouring the defendant's case. Arising from his attempt to resolve the conflicts in the said affidavit evidence the learned judge had also made a number of contradictory findings in his judgment. We found, as a fact, there

A are conflicts in the affidavit evidence filed by both the parties and contradictory findings of the learned judge, some of which can be highlighted as follows.

B [7] We noted the learned judge held that the marriage of the plaintiff and the defendant would not have broken down if it were not for the defendant committing adultery with Law Sok Noy and maintaining such adulterous relationship with her. The learned judge went on to hold that the defendant and Law Soy Noy must bear the full responsibility for the breakdown of the marriage between the defendant and the plaintiff. However, the learned judge C later in his judgment held that the plaintiff was the cause of the breakdown of the marriage which is contradictory to what he had held earlier. On this point we observed that the decision of the learned judge was, obviously, based and influenced by the statements made by the children against the plaintiff as contained in the affidavit of the defendant which were not only unsworn D but also hearsay evidence.

[8] We also noted that the learned judge took into consideration only the affidavit evidence of the defendant and held that the plaintiff sold the goods and converted the cash for her own use. The learned judge had failed to take E into consideration the affidavit evidence of the plaintiff that the cash had been utilised to finance the purchase of the said matrimonial property, and other immovable and moveable property for the defendant and for the payment of other expenses (see pp 177–181 of the appeal record).

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[9] We are also of the view that the learned judge erred in law and fact in holding that the contemporary documentary evidence exhibited in the defendant's affidavits were not controverted and showed that the plaintiff is a wealthy person. We find the allegations that the plaintiff had taken all the G money of the defendant's company in the sum of approximately RM5m kept in banks had been denied and explained by the plaintiff in her affidavits (see pp 166–171 of the appeal record).

[10] We further observed that the learned judge erred in holding that the H plaintiff operated overseas bank account in both China and Taiwan. The evidence given by the defendant did not show that the plaintiff operated bank account in China. The bank account in Taiwan had been explained by the plaintiff, that is, the money was sent for use by the plaintiff's parents in Taiwan (see p 181 of the appeal record).

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[11] It is our judgment that in view of the many disputed facts raised in the affidavits filed by the plaintiff and the defendant where such allegations made were credibly denied by the respective parties, the learned judge of the High Court should have ignored these disputed facts instead of unduly resolving

them in favour of the defendant. The learned judge must decide the case before him by consideration of the undisputed facts. It is noted that in the proceedings before the High Court neither the plaintiff nor the defendant called oral evidence or applied to cross-examine the deponents of the respective affidavits so as to prove a disputed fact. On this point O 38 r 2(3) of the Rule of the High Court 1980 empowers the court to allow the parties to examine the deponents of the opposing affidavit which reads in these terms:

> (3) In any cause or matter began by Originating Summons, Originating Motion or Petition, and, on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination on the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

[12] It is true in civil proceedings the trial judge has no power to dictate a litigant what evidence he should tender. The court cannot give direction about evidence unless one of the litigants desires such direction to be made (see the case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433). However, in the context of the present case we are of the view the learned judge of the High Court should have at least indicated to the particular party concerned that unless he or she calls oral evidence or applies to cross-examine the deponents of the opposing affidavits to prove either a disputed fact or for the purposes of disproving an allegation made, then he or she may not succeed in proving his or her case. At the end of the day it is the trial judge who must decide the case on the evidence before him. In the present case we find that the learned judge of the High Court had failed to do so.

CONCLUSION

[13] For the reasons above stated, we are of the view this is a fit and proper case for us to set aside the order of the High Court dated 27 October 2004 and make an order that by consent the case be remitted to the High Court for trial by *viva voce* on the issue of maintenance of the plaintiff (wife). We also make an interim order of a sum of RM6,000 per month to be paid by the defendant to the plaintiff as maintenance from the month of November 2006 until the matter in the originating summons dated 8 July 2004 relating to the maintenance of the wife is decided and determined by the High Court at Kuala Lumpur. The defendant is to pay the plaintiff the arrears of maintenance of RM6,000 per month from 8 July 2004 until the

month of October 2006 on or before 1 Mac 2007. The cost of the proceeding in this appeal is to follow the event of the retrial and the deposit is to be refunded to the plaintiff.

Appeal allowed with costs.

Reported by Brendan Navin Siva